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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 350

REPUBLIC OF CUBA, BANCO PARA EL COMERCIO EXTERIOR DE CUBA AND JAN SNOBL, CHARGE D'AFFAIRS AD INTERIM OF CZECHOSLOVAK SOCIALIST REPUBLIC,

Petitioners,

v.

FLOTA MARITIMA BROWNING DE CUBA, S.A.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent accepts petitioners' references to the opinions below, the statement of the grounds on which the jurisdiction of this Court is invoked, and, except as hereinafter noted, the questions presented and the statement of the case.

QUESTIONS PRESENTED

The respondent believes that the questions presented may be more accurately and succinctly summarized as follows:

1. Whether the District Court was without admiralty jurisdiction in proceedings to recover for breach of a charter either (a) because the charter also contained options to purchase or (b) because the chartered vessel could properly be considered a dead ship by reason of inactivity pending a strike and outfitting for a new service.

2. Whether the District Judge properly exercised his discretion in (a) ordering the sale of a deteriorating vessel when for more than six years petitioners had failed to maintain the vessel or to post security for its release, (b) denying the petitioners' motion for cross-security, and (c) denying the petitioners' motion to require the United States Marshal to restore the vessel or post bond for the cost of restoration.

3. Whether those interested in the vessel waived sovereign immunity from jurisdiction or execution.

STATEMENT OF THE CASE

In addition to petitioners' statement of the case it should be noted that until the petitioners, nearly three years after the seizure of the vessel, filed a plea of sovereign immunity, nothing was done to secure the release of the vessel and no effort to post security has ever been made. Meanwhile, as pointed out by the District Court,[1] the vessel was deteriorating and has become a danger to other vessels in Baltimore harbor.

Petitioners are in error in stating that only $30,000 is claimed as a maritime lien against the vessel. In addition to claims in personam with a clause of foreign attachment, the amended libel asserts in rem claims against the CIUDAD DE LA HABANA in the amount of $30,000 for expenditures incurred in the performance of the charter

[1] App. B, pages 11a and 19a.

and $223,000 for loss of profits expected from the charter of that vessel, performance of which had been commenced and for which the libelant may be entitled to a lien claim.[2] In addition there are lien claims by the intervening libelants for agency fees, watchmen's services and wharfage, all aggregating about $31,000.

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION IN ADMIRALTY.

The petitioners' arguments that the District Court was without jurisdiction in admiralty are based on two premises, both of which appear to stem from the conception that an agreement for the construction of a vessel is not a maritime contract because the contract, far from being purely maritime and touching rights and duties pertaining to navigation, is made on land, to be performed on land.[3] As extensions of that doctrine it is argued first that a contract to sell a vessel is like a contract to build and hence

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[2] See *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U.S. 490 (1923); Gilmore and Black on *The Law of Admiralty*, pages 520-526.

[3] See *People's Ferry Co. of Boston v. Beers*, 20 Howard 393 at 402 (1857). That decision was reaffirmed, although criticism of it was recognized as not inappropriate, in *Thames Towboat Company v. The Frances McDonald*, 254 U.S. 242 at 244 (1920). By the standards for determining maritime contracts discussed by Mr. Justice Story on circuit in *DeLovio v. Boit*, 7 Fed. Cas. 418, No. 3776 (CC Mass. 1815) and adopted by this Court in *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 Howard 344 (1846), and *Insurance Company v. Dunham*, 11 Wall. 1 (1870), the construction contract cases appear to rest more on the now rejected *locality* test, and hence unduly restrictive of the admiralty jurisdiction recognized by those decisions looking to the *nature* of the contract. Compare the views expressed by this Court in *New Bedford Drydock Company v. Purdy*, 258 U.S. 96 (1922), when the Court declined to extend the doctrine classifying contracts for the construction of entirely new ships as non-maritime, stating that reasonable doubts should be resolved in favor of the admiralty jurisdiction.

is not maritime; and secondly that an idle vessel is not a vessel at all, and consequently may not be subject to seizure under the process of the admiralty court. It is appropriate here to point out that the first argument was advanced initially in the District Court more than six years ago, but was not thereafter reasserted until the second appeal before the Court of Appeals for the Fourth Circuit. The idle ship argument was never raised in the District Court but was first mentioned in the Court of Appeals on the second appeal. Although jurisdictional points may doubtless be raised at any time, their belated assertion may be some indication of their lack of intrinsic merit.

A. *The Lease-Purchase Agreement is a Maritime Contract.*

Petitioners' contention that the lease-purchase agreement was not a maritime contract subject to admiralty jurisdiction rests primarily upon the decision in *The Ada*, 250 Fed. 194 (2 Cir. 1918), which held that a contract for the sale of the vessel was not a maritime contract and that the accompanying charter provisions were inseparable from the sales provisions. That decision has been criticized in a comment on "Admiralty Jurisdiction and Ship Sale Contracts", 6 Stanford Law Review 640. Certainly its acceptance would constitute an undesirable extension of the construction contract doctrine.

However, it is unnecessary for the Court to resolve that controversy, since quite apart from the question of the soundness of the decision in *The Ada*, and certainly it is difficult to imagine a contract more maritime in nature than one providing for the sale of a vessel, that case was distinguished both in the District Court and the Court of Appeals because the charter provisions, which were clearly the subject of admiralty jurisdiction, were held to

be separable from those relating to the options to purchase, which had not been exercised here as they had been in *The Ada*. Hence the decision in this case is not in conflict with that of another Court of Appeals on the same matter.

B. *The CIUDAD DE LA HABANA was not a Dead Ship.*

Petitioners' contention that admiralty jurisdiction was lacking because the vessel was a dead ship, raised as above noted for the first time in the Court of Appeals on the second appeal, rests on a misconception. Basic to the argument is the view that an idle ship may not be the subject of a maritime contract — a contention analogous to the reasoning underlying the holding that a contract to build a new vessel is non-maritime. Clearly however a vessel idle either as a result of the strike or in preparation for a new voyage, or merely in port between voyages, is not a dead ship nor has it been withdrawn from navigation. The limitations on the dead ship argument are clearly pointed out in *Hercules Company, Inc. v. The Brigadier General Absolom Baird*, 214 F. 2d 66 (3 Cir. 1954), where the Court found that the ship had not been withdrawn from navigation and declined to extend the "no vessel" analogy of the construction cases when the vessel was being readied for use, even though not then able to navigate. Carried to an extreme the petitioners' argument would mean that no ship was the subject of admiralty jurisdiction at any time except when it was sailing.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN ORDERING A SALE AND DENYING THE MOTION FOR CROSS-SECURITY.

On this branch of the petition reliance is placed on Rules E(9)(b) and E(7) of the recently adopted Supplemental

Rules for Certain Admiralty and Maritime Claims. Since the Supplemental Rules became effective only on July 1, 1966, reference should have been made to their counterparts, the former Supreme Court Admiralty Rules 12 and 50, which prevailed when the District Court took action upon the respective motions.

A. *The Order of Sale Was Proper.*

Whether governed by Rule 12 or by present Rule E(9)(b), the District Court is clearly justified in ordering the sale of deteriorating property. Here such deterioration was plainly present, as found by the District Court, and in addition the vessel created a dangerous condition in Baltimore harbor. Obviously under such circumstances the Court's discretion was appropriately exercised, and the Court of Appeals so held.[5]

Petitioners' reference to the Cuban Assets Control Regulations as a reason for the denial of a sale is without merit. Application has been made for the necessary license and of course no sale will be made without it. The very fact that a license is necessary points up the control exercised by the United States over assets alleged to belong to the Cuban Government or Cuban nationals, and indicates the desirability of a sale. Clearly it is the policy of this Government not to release assets to Cubans at the present time or in the foreseeable future. Hence if the vessel is not sold and the proceeds held for the account of those concerned, including the Cubans, the vessel will waste still further away and eventually will become a total loss.

B. *The Motion for Cross-Security Was Properly Denied.*

Even more within the discretion of the District Court was its action on petitioners' motions to require the libelant

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[5] App. A, page 7a.

to file security under the provisions of Rule 50 of the Supreme Court Admiralty Rules, and to compel the Marshal to restore the vessel or post bond. The exercise of that discretion was likewise approved by the Court of Appeals.[6]

III.

SOVEREIGN IMMUNITY WAS WAIVED.

For the sixth time petitioners assert a claim to sovereign immunity from jurisdiction and execution. When raised initially the plea was denied by the District Court,[7] and that ruling was affirmed by the Court of Appeals.[8] A review by this Court on a petition for a writ of prohibition and/or mandamus was denied.[9] A further plea to the District Court was again denied,[10] and again affirmed by the Court of Appeals.[11]

Certainly there should be some finality to litigation and a party should not be permitted endlessly to raise the same question, more particularly when this Court, although not squarely presented with the question, has indicated in *Ex Parte Peru*, 318 U.S. 578 at 589 (1943), that there may be a waiver of sovereign immunity.

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[6] App. A, page 7a.

[7] *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 218 F. Supp. 938 (D.C. Md. 1963).

[8] *Flota Maritima Browning de Cuba, S.A. v. M.V. Ciudad de la Habana*, 335 F. 2d 619 (4 Cir. 1964).

[9] *Duda, Ambassador of Czechoslovak Socialist Republic v. United States District Court for the District of Maryland*, 380 U.S. 970 (1965).

[10] *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 245 F. Supp. 205 (D.C. Md. 1965).

[11] *Flota Maritima Browning de Cuba, S.A. v. Dr. Jan Snobl, etc., et al.* (App. A, not yet officially reported, 4 Cir. 1966).

CONCLUSION

Because this case presents no real conflict with the decision of another Federal Court of Appeals, because it involves only questions of discretion exercised by the District Court in the administration of its jurisdiction over the res, and because the petitioners have had their day in Court on the question of sovereign immunity the petition for certiorari should be denied.

Respectfully submitted,

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